In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 969

KECO INDUSTRIES, INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. In June 1952 petitioner, a manufacturer of specialized air conditioning equipment, was awarded a contract by the Department of the Army for the production of 200 refrigeration units. One hundred were to be gasoline driven; the contract price was $1,720 each. The other hundred were to be electric driven; their contract price was $1,271 each—$449 less per unit. (Fdg. 1(b), Pet. App. 43, 34.) In June 1953, while petitioner was working on the gasoline unit pilot model, and before any gasoline driven units had been produced, the contracting officer wrote petitioner that, "In accordance with the Changes Article of subject contract, Item No. 3, refrigeration unit, gasoline engine driven, as described in the con-

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tract, is to be changed to refrigeration unit, electric motor driven, identical to Item No. 2 of the contract" (Fdg. 18(a)(b), Pet. App. 59, 34).

Petitioner immediately informed the government that it was "agreeable to this change" and would allow the government a credit of $28,600 against the contract price (Fdg. 18(b), Pet. App. 59, 35). Shortly thereafter, petitioner offered to increase the government's credit to $32,850 (Fdg. 18(c), Pet. App. 59–60, 35). The contracting officer rejected this proposal as inadequate (Fdg. 19, Pet. App. 60–61, 35).

On October 9, 1953, the contracting officer issued his formal change order, confirming his earlier order (Fdg. 20(a), Pet. App. 61–62), and on the same day petitioner sent a letter to the government stating that it had carefully reviewed the costs involved in the production and would accept a further reduction in the contract price (Fdg. 20(b), Pet. App. 62). On December 17, 1953, petitioner wrote the government that its production had been completed, and, for the first time, petitioner requested an increase in the unit price (Fdg. 20(d), Pet. App. 63).

Petitioner had previously invited the government to "verify the cost figures by examination of our books" (A.R. 13, 23).[1] Accordingly, government auditors visited the company from December 14 through December 18, 1953, for the purpose of reviewing the petitioner's records (A.R. 476; see, also, Fdg. 23, Pet. App. 67). The government audit of petitioner's

[1] "A.R." references are to the Record of the Armed Services Board of Contract Appeals, the original of which has been lodged with this Court.

manufacturing costs, dated January 4, 1954, confirmed that the petitioner had made an improvident bid by underestimating the material and labor costs with respect to both types of refrigerators (Fdg. 22, Pet. App. 64). The audit revealed that petitioner, on its original bid for the contract, would have sustained a unit loss of $332.58 on the electric refrigerators and $148.80 on the gasoline refrigerators (Pet. App. 35).

In view of the conflict between petitioner and the contracting officer as to the proper adjustment to be made, the Disputes clause of the contract was invoked. The Armed Services Board of Contract Appeals ruled that the change from gasoline engine to electric engine was within the purview of the Changes Article of the contract (Fdg. 23, Pet. App. 65–66). It further held, with respect to the additional 100 electric refrigerators delivered as a result of the change, that petitioner was entitled to the actual cost of their production plus a 10 percent profit (Fdg. 23, Pet. App. 70). Under this determination, petitioner was paid $1,763.94 for each of these additional refrigerators.

Petitioner then brought this suit challenging the Board's determination with respect to the applicability of the Changes Article. The government filed a counterclaim, contending that petitioner had not been entitled to receive more for the electric refrigerators than it would have received had gasoline refrigerators been delivered. The Court of Claims ruled in the government's favor on both the complaint and the counterclaim (Pet. App. 26). It held (1) that the change from 100 gasoline to 100 electric refrigerators

was permissible since "the two types of refrigerators were essentially the same except for the power units which [petitioner] purchased fully assembled" (Pet. App. 39), and (2) that, under the doctrine of "equitable adjustment," petitioner was to be placed in the same position regarding profit or loss that it would have occupied had there been no change order—with the result that, since the change order required petitioner to supply refrigerators that cost less to produce than those contracted for, there must be a reduction in the contract price (Pet. App. 41–42).

2. The decision below is correct, and further review is not warranted.

a. The Court of Claims properly ruled that the substitution by the government of electric refrigerators for gasoline refrigerators was within the scope of the Changes Article of the contract. As the court pointed out, "[t]he overall dimensions of the two types of refrigerators and most basic parts were the same" and "the evidence establishe[d] that the only essential or significant difference was in the power units which [petitioner] purchased fully assembled" (Pet. App. 38). In these circumstances, the court rightly concluded that the change was not so drastic as to be outside the scope of the contractual provision reserving to the government the right to make changes.

b. The Changes Article provided that, "If any such change causes an increase or decrease in the cost of * * * performance of this contract, an equitable adjustment shall be made in the contract price" (Pet. App. 36, 44). As the court below held, under settled principles this provision entitled the government to a

downward revision of the contract price when it accepted the electric refrigerators, a less expensive article, in place of the gasoline refrigerators. "Equitable adjustments * * * are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract. Since the purpose underlying such adjustments is to safeguard the contractor against increased costs engendered by the modification, it appears patent that the measure of damages cannot be the value received by the Government, but must be more closely related to and contingent upon the altered position in which the contractor finds himself by reason of the modification." *Bruce Construction Corporation* v. *United States,* 324 F. 2d 516, 518 (Ct. Cl.). See, also, *United States* v. *Callahan Walker Co.,* 317 U.S. 56, 61. By a parity of reasoning, the United States is entitled to a credit on the contract price where the value of the work originally contracted for is greater than the value of the work as changed. *United States* v. *Rice,* 317 U.S. 61, 63 (the government "reduced the payment to [the contractor] by about $1,000 because of construction economies under the new plan"); *S. N. Nielsen Company,* 141 Ct. Cl. 793, 796–797.[2]

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[2] See McBride, *Confusion in the Concept of Equitable Adjustments in Government Contracts: A Reply,* 22 Fed. B. J. It has long been the rule that the changes clause is not a vehicle with which to rescue a contractor from the consequences of an improvident bid. Generally, the rule which is applied is that the contractor, or the Government, as the case may be, is entitled by way of an equitable adjustment to the extra expenses (or savings) resulting directly from the change. For this reason, the fear that errors in bid and that the operations of inefficient contractors will be rewarded seems to be unfounded.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967